UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

TO: Gene A. Lucero, Director
Office of Waste Programs Enforcement

FROM: Lee A. DeHihns, III
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SUBJECT: Authority To Use CERCLA to Provide Enforcement Funding Assistance to States

This responds to your request for our opinion as to whether costs incurred by states to compel responsible party cleanups and to monitor and report to the public on such cleanups are payable from the Hazardous Substance Response Trust Fund ("Superfund"). It is our view that these state enforcement costs are not allowable; but costs for activities authorized by section 104(b) that support enforcement efforts are allowable.

Discussion

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) authorizes payment of the costs of a "program to identify, investigate, and take enforcement and abatement action against releases of a hazardous substance." §111(c)(3). We have earlier advised */ that this authority is not restricted to the payment of federal enforcement costs.

Section 111(a) sets out the authorized uses of Superfund as: governmental response costs under section 104, response claims, natural resources damage claims, the costs specified in section 111(c), and necessary administrative expenses. However, section 111 is not authority for payment of these costs when incurred by states or local governments. The only authority in

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*/ Memorandum entitled "Superfund Cost Issues" dated September 22, 1981, from Gerald Yamada, Acting Associate General Counsel, to Bill Sullivan, Deputy Associate Administrator for Enforcement Policy.

CERCLA to award assistance to states and local governments is section 104(d)(1). Consequently, only those state costs that can be viewed as "response" costs under section 104 are payable from Superfund.

Section 104(d)(1) provides that:

> Where the President determines that a state or political subdivision thereof has the capability to carry out any or all of the actions authorized in this section, the President may . . . enter into a contract or cooperative agreement with such state or political subdivision to take such actions in accordance with the criteria and priorities established pursuant to section 105(8) of this title and to be reimbursed for the reasonable response costs thereof from the Fund . . . .

Under this authority, EPA may enter into an agreement providing funds for a state (or its political subdivision) to undertake a response action in accordance with criteria used to develop the National Priorities List (NPL) pursuant to section 105(8) of CERCLA. The NPL establishes priorities among sites of releases or threatened releases based on their relative risk of danger to the public health or welfare or to the environment. Consequently, remedial action agreements are limited by the statute to actions at NPL sites. Similarly, risk-related criteria must be used "to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action." §105(8)(A). Thus, any agreement under section 104(d)(1) must be for a site-specific response.

A response is either a removal or a remedy. §101(25). A removal means:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of a release . . ., such actions as may be necessary to monitor, assess, and evaluate the release . . ., the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release . . . . §101(23)

A remedy consists of:

> those actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public welfare or the environment . . . . §101(24)

For a state to be awarded funds for enforcement actions against those responsible for releases of hazardous substances, to monitor private party cleanups, or to conduct community relations activities related to such cleanups, these actions must come within the meaning of "response." Certain activities that would support an enforcement effort are clearly within the purview of section 104. There is, for example, broad authority for studies, investigations, and other information gathering:

> to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances . . . involved, and the extent of danger to the public health or welfare or to the environment . . . (and to) plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Act. §104(b)

This, section authorizes studies and investigations to identify responsible parties, to determine the extent and nature of the problem and the risk it presents, and to determine the appropriate remedy (i.e., RI/FS activities). These studies and investigations are necessary for the government to initiate either a Superfund-financed cleanup or an enforcement action. However, section 104(b) deals only with studies, investigations and information collection; the issue remains as to whether the costs of administrative proceedings or litigation to compel private cleanups, the monitoring of such private efforts, and community relations activities to inform the public regarding these private actions can be viewed as "response."

In support of the interpretation that enforcement efforts are "response" actions, it could be argued that such efforts are included within the meaning of section 104(a)(1). This section authorizes the President to:

> act, consistent with the national contingency plan, to remove or arrange for the removal of and provide for remedial action . . . or take any other response measure . . . to protect the public health or welfare or the environment, unless the President determines that such

> removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

If Congress intended that the first recourse in the event of a release was to the responsible party, then Congress arguably must also have meant enforcement actions to be among the responses available to the government under section 104. This approach would necessarily focus on the general language in the definitions of removal and remedy to the exclusion of the examples cited therein.

While it may be possible to make this argument and interpret "response" to include state enforcement actions, it is our view that it is a difficult argument to make and that a better interpretation is that section 104(a)(1) stops short of authorizing Superfund to be used to support such state enforcement efforts. Such a reading of the term "response" is too broad. The intent of section 104 is to support governmental efforts to identify problems associated with a particular release, determine the appropriate action, and carry out that action. This seems clear from the action examples cited in sections 101(23) and (24) in defining "response."

It is our view that Congress did not intend a private party cleanup to be included in the definition of a "response" under section 104. We conclude that state activities paid from the Superfund must be carried out under section 104(d)(1). Accordingly, the Superfund eligibility of state enforcement costs is limited to those activities authorized by section 104(b). Section 104(b) authority does not extend to litigation or other efforts to compel private party cleanups, or to monitoring or community relations activities associated with such cleanups. Payment of these state enforcement-related costs will require more explicit statutory authority than exists in section 104.